Case T-342/99

Airtours plc

v

Commission of the European Communities

(Competition — Regulation (EEC) No 4064/89 — Decision declaring a concentration to be incompatible with the common market — Application for annulment — Relevant market — Collective dominant position — Proof)

Summary of the Judgment

1. *Competition — Concentrations between undertakings — Assessment of compatibility with the common market — Relevant market — Definition — Criteria — Application to the foreign package holiday market*

   (Council Regulation No 4064/89)

2. *Competition — Concentrations between undertakings — Investigation by the Commission — Findings necessary for recognition of a collective dominant position significantly impeding competition in the common market — Link between the notified concentration and the collective dominant position concerned — Establishment*

   (Council Regulation No 4064/89)

3. *Competition — Concentrations between undertakings — Assessment of compatibility with the common market — Existence of a collective dominant position significantly impeding effective competition in the common market — Definition*

   (Council Regulation No 4064/89, Art. 2(3))

4. *Competition — Concentrations between undertakings — Assessment of compatibility with the common market — Creation of a collective dominant position significantly impeding effective competition in the common market — Conditions*

   (Council Regulation No 4064/89, Art. 2(3))

5. *Competition — Concentrations between undertakings — Assessment of compatibility with the common market — Creation of a collective dominant position significantly impeding effective competition in the common market — Commission's analysis — Close examination of the circumstances relevant for assessing the effects of the concentration on competition in the reference market*

   (Council Regulation No 4064/89)

6. *Competition — Concentrations between undertakings — Assessment of compatibility with the common market — Creation of a collective dominant position significantly impeding effective competition in the common market — Burden of proof*

   (Council Regulation No 4064/89)

7. *Competition — Concentrations between undertakings — Investigation by the Commission — Assessments of an economic nature — Discretion — Judicial review — Limits*

   (Council Regulation No 4064/89, Art. 2)

8. *Competition — Concentrations between undertakings — Assessment of compatibility with the common market — Creation of a collective dominant position significantly impeding effective competition in the common market — Need for the Commission to take into account, in the course of its examination, the level of competition obtaining in the relevant market at the time when the transaction is notified*
   (Council Regulation No 4064/89)

9. *Competition — Concentrations between undertakings — Assessment of compatibility with the common market — Creation or strengthening of a collective dominant position significantly impeding effective competition in the common market — Evidence of tacit collusion between economic operators — Stability of historic market shares*
   (Council Regulation No 4064/89)

10. *Competition — Concentrations between undertakings — Assessment of compatibility with the common market — Creation of a collective dominant position significantly impeding effective competition in the common market — Stable demand displaying low volatility — Relevant factor in finding collective dominant position to exist*
   (Council Regulation No 4064/89)

1. As regards the application of Regulation No 4064/89 on the control of concentrations between undertakings, a proper definition of the relevant market is a necessary precondition for the assessment of the effects on competition of the concentration notified. In that regard, the definition of the market in the products affected by the merger must take account of the overall economic context so as to make it possible to assess the actual economic power of the undertaking or undertakings in question and, for that purpose, it is necessary first to define the products which, although incapable of being substituted for other products, are sufficiently interchangeable with the undertaking's own products, both as regards their objective characteristics and the competitive conditions and the structure of supply and demand on the market.

(see paras 19-20)

2. Where, for the purposes of applying Regulation No 4064/89 on the control of concentrations between undertakings, the Commission examines a possible collective dominant position, it must ascertain whether the concentration would have the direct and immediate effect of creating or

strengthening a position of that kind, which is such as significantly and lastingly to impede competition in the relevant market. If there is no substantial alteration to competition as it stands, the merger must be approved.

In the case of an alleged collective dominant position, the Commission is obliged to assess, using a prospective analysis of the reference market, whether the concentration which has been referred to it leads to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of factors giving rise to a connection between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers.

(see paras 58-59)

3. A collective dominant position significantly impeding effective competition in the common market or a substantial part of it may thus arise as the result of a concentration where, in view of the actual characteristics of the relevant market and of the alteration in its structure that the transaction would entail, the latter would make each member of the dominant oligopoly, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article 81 EC and without any actual or potential competitors, let alone customers or consumers, being able to react effectively.

The prospective analysis of the market necessary in any assessment of an alleged collective dominant position must not only view that position statically at a fixed point in time — the point when the transaction takes place and the structure of competition is altered — but must also assess it dynamically, with regard in particular to its internal equilibrium, stability, and the question as to whether any parallel anti-competitive conduct to which it might give rise is sustainable over time.

(see paras 61, 192)

4. Three conditions are necessary for the creation of a collective dominant position significantly impeding effective competition in the common market or a substantial part of it:

— first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy. In that regard, it is not enough for each member of the dominant oligopoly to be aware that interdependent market conduct is profitable for all of them but each member must also have a means of knowing whether the other operators are adopting the same strategy and whether they are maintaining it. There must, therefore, be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving;

— second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market. It is only if all the members of the dominant oligopoly maintain the parallel conduct that all can benefit. The notion of retaliation in respect of conduct deviating from the common policy is thus inherent in this condition. In that context, the Commission must not necessarily prove that there is a specific 'retaliation mechanism' involving a degree of severity, but it must none the less establish that deterrents exist, which are such that it is not worth the while of any member of the dominant oligopoly to depart from the common course of conduct to the detriment of the other oligopolists. For a situation of collective dominance to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy, which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action by the others, so that it would derive no benefit from its initiative;

— third, it must also be established that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardise the results expected from the common policy.

(see paras 62, 195)

5. The prospective analysis which the Commission has to carry out in its review of concentrations involving collective dominance calls for close examination in particular of the circumstances which, in each individual case, are relevant for assessing the effects of the concentration on competition in the reference market.

(see para. 63)

6. Where the Commission takes the view that a concentration between undertakings should be prohibited because it will create a situation of collective dominance, it is incumbent upon it to produce convincing evidence thereof. The evidence must concern, in particular, factors playing a significant role in the assessment of whether a situation of collective dominance exists, such as, for example, the lack of effective competition between the operators alleged to be members of the dominant oligopoly and the weakness of any competitive pressure that might be exerted by other operators.

(see para. 63)

7. The basic provisions of Regulation No 4064/89 on the control of concentrations between undertakings, in particular Article 2 thereof, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature. Consequently, when the exercise of that discretion, which is essential for defining the rules on concentrations, is under review, the Community judicature must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations.

(see para. 64)

8. The level of competition obtaining in the relevant market at the time when the concentration is notified is a decisive factor in establishing whether a collective dominant position has been created for the purposes of Regulation No 4064/89 on the control of concen-

trations between undertakings. As regards the assessment of whether a collective dominant position exists, one of the questions which the Commission is required to address is whether the concentration referred to it would result in effective competition in the relevant market being significantly impeded. If there is no significant change in the level of competition obtaining previously, the merger should be approved because it does not restrict competition.

(see para. 82)

9. For the purpose of determining whether there is a collective dominant position, the stability of historic market shares is a factor conducive to the development of tacit collusion, inasmuch as it facilitates division of the market instead of fierce competition, each operator referring to its historic market share in order to fix its production in proportion thereto.

(see para. 111)

10. Economic theory regards volatility of demand as something which renders the creation of a collective dominant position more difficult. Conversely, stable demand, thus displaying low volatility, is a relevant factor indicative of the existence of a collective dominant position, in so far as it makes deviations from the common policy (that is, cheating) more easily detectable, by enabling them to be distinguished from capacity adjustments intended to respond to expansion or contraction in a volatile market.

(see para. 139)